TABLE F-7

Top 15 Programming Services by Prime Time Rating*

Rank	Programming Service	MSO with Ownership Interest
1	TNT	Time Warner (100%)
2	Nickelodeon/Nick at Nite	None
3	TBS	Time Warner (100%)
4	USA Network	None
5	Lifetime Television	None
6	Arts & Entertainment (A&E)	None
7	ESPN	None
8	The Discovery Channel	TCI (49%), Cox (24.5%)
9	The Cartoon Network	Time Warner (100%)
10	The Family Channel	None
11	TNN (The Nashville Network)	None
12	CNN	Time Warner (100%)
13	Sci-Fi Channel	None
14	The Learning Channel	TCI (49%), Cox (24.5%)
15	fX	TCI (50%)

* Superstations included in the source data are not included in this ranking.

Source: Paul Kagan Assocs., Inc., *Second Quarter 1997 Prime-Time Ratings*, Cable TV Programming, Aug. 31, 1997, at 6.

APPENDIX G

Program Access Matters Resolved

1. In a program access complaint decided in 1997, Cross Country Cable, Inc. ("Cross Country") alleged that C-TEC Cable Systems of Michigan, Inc. ("C-TEC") violated both the geographic uniformity requirement and the program access provisions of the Communications Act.[1] Cross Country alleged that C-TEC provided cable service in Cross Country's franchise area, and that discounts offered to subscribers by C-TEC resulted in non-uniform pricing and impeded Cross Country's ability to provide satellite cable programming to consumers. The Cable Services Bureau ("Bureau") found that C-TEC was subject to effective competition in the area at issue and therefore the uniform rate requirement did not apply to C-TEC. The Bureau denied the program access complaint, finding that Cross Country had not made a showing that the discount was an unfair method of competition or deceptive practice that prevented the distribution of programming.

2. In a program access complaint dismissed in 1997, OpTel, Inc. ("OpTel") alleged that Continental denied OpTel access to Prime Ticket programming services pursuant to an exclusivity agreement that was not grandfathered pursuant to 47 U.S.C. § 548(h) and 47 C.F.R. § 76.1002(e).[2] In the alternative, OpTel claimed that Continental unreasonably refused to sell programming to OpTel in violation of 47 U.S.C. § 548(c)(2)(B). Subsequent to the complaint, Continental waived its exclusive right to Prime Ticket's programming with respect to all other multichannel video programming distributors, including, but not limited to, OpTel. OpTel and Continental then filed a joint stipulation for dismissal, in which they requested that the Bureau dismiss OpTel's complaint with prejudice and without costs. The Bureau dismissed the proceeding pursuant to the joint stipulation for dismissal.

3. In 1997, Corporate Media Partners d/b/a Americast ("Americast") and Ameritech filed an Application for Review of a program access complaint involving exclusivity that was decided in 1996.[3] In the 1996 complaint, Americast and Ameritech alleged that they had been denied access to HBO programming as a result of Continental's and HBO's exclusive contract. In denying the complaint, the Bureau concluded that parties to an exclusive contract may enforce an exclusivity provision with respect to newly-acquired systems, where the contract included an after-acquired systems provision that was made part of the contract prior to June 1, 1990. The Commission affirmed the conclusions of the Bureau, and denied the Application for Review.[4]

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[1] *Cross Country Cable, Inc. v. C-TEC Cable Systems of Michigan, Inc.*, Order, 12 FCC 2538 (CSB 1997).

[2] *OpTel, Inc. v. American Cablesystems of California, Inc., d/b/a/ Continental Cablevision, Inc.*, Order, 12 FCC Rcd 2559 (CSB 1997).

[3] *Corporate Media Partners d/b/a/ Americast and Ameritech New Media, Inc. v. Continental Cablevision, Inc., and Home Box Office*, Order, 11 FCC Rcd 7735 (CSB 1996).

[4] *Corporate Media Partners d/b/a/ Americast and Ameritech New Media, Inc. v. Continental Cablevision, Inc*, Memorandum Opinion and Order, 12 FCC Rcd 3455 (rel. March 17, 1997).

4. RCN Telecom Services of Massachusetts, Inc. ("RCN") moved to withdraw its Petition For Partial Reconsideration and Request for Expedited Decision ("Petition") of *Interface Communications Group, Inc., Digital Broadband Applications Corp. and RCN v. Cablevision Systems Corp., Rainbow Programming Holdings, Inc. and American Movie Classics Company*, and requested that the Petition be dismissed with prejudice. In its Petition, RCN stated that it had been afforded access to the programming at issue in the proceeding. The Bureau dismissed the complaint with prejudice.[5]

5. Bell Atlantic Video Services Company ("BVS") filed a program access complaint against Rainbow Programming Holdings, Inc. ("Rainbow") and Cablevision alleging discrimination by Rainbow in the sale of satellite cable programming and the exercise of undue influence by Cablevision in violation of Sections 628(b) and (c) of the Communications Act, and Section 76.1002 of the Commission's rules. The Bureau found that Rainbow discriminated against BVS in the sale of satellite video programming in violation of Sections 628(c)(2)(B) of the Communications Act, and Section 76.1002 of the Commission's rules.[6] The Bureau did not address BVS's claim that Cablevision had exercised undue influence over Rainbow or whether Rainbow's actions constituted unfair methods of competition.

6. In a program access complaint dismissed in 1997, British American Communications, Inc. ("BAC") alleged that Prime Ticket Network, et al., denied BAC access to Prime Ticket programming services pursuant to an exclusivity agreement that was not grandfathered pursuant to 47 U.S.C. § 548(h) and 47 C.F.R. § 76.1002(e). In the alternative, BAC claimed that Prime Ticket unreasonably refused to sell programming to BAC in violation of 47 U.S.C. § 548(c)(2)(B) and 47 C.F.R. § 76.1002(b). Subsequent to the complaint, the Trustee for Prime Ticket and BAC entered into an agreement pursuant to which BAC would be able to distribute Prime Ticket's programming in certain of BAC's systems. BAC and Prime Ticket, et al., then filed a joint stipulation for dismissal, in which they requested that the Bureau dismiss the complaint with prejudice. The Bureau dismissed the proceeding pursuant to the joint stipulation for dismissal.[7]

7. Americast and Ameritech filed a program access complaint pursuant to 47 U.S.C. §§ 548(b) and 548(c)(2)(B) and 47 C.F.R. § 76.1002(b) alleging that Rainbow engaged in price discrimination and discrimination in marketing requirements and other terms and conditions in agreements between Rainbow and Americast. Rainbow answered denying discrimination and asking that the complaint be dismissed with prejudice. Americast and Ameritech replied asking for relief without further fact-finding or procedural steps. The Bureau granted the complaint with respect to claims of price

[5] *Interface Communications Group, Inc., Digital Broadband Applications Corp. and RCN v. Cablevision Systems Corp., Rainbow Programming Holdings, Inc. and American Movie Classics Company*, Order, 12 FCC Rcd 6052 (CSB 1997).

[6] *Bell Atlantic Video Services Company v. Rainbow Programming Holdings, Inc. and Cablevision Systems Corporation*, Order, 12 FCC Rcd 9892 (CSB 1997).

[7] *British American Communications, Inc. v. Prime Ticket Network, et al.*, Order, 12 FCC Rcd 10284 (CSB 1997).

discrimination and discrimination in marketing requirements and dismissed the complaint with respect to claims of discrimination in other terms and conditions.[8]

8. In a program access complaint dismissed in 1997, Wizard Programming, Inc. ("Wizard") alleged that Superstar/Netlink Group, L.L.C. ("SNG") and TCI engaged in unfair methods of competition or unfair or deceptive acts or practices in the sale of satellite broadcast programming in violation of Section 628(b) of the Communications Act.[9] Wizard claimed that SNG has discriminated against Wizard in the prices, terms, and conditions of sale or delivery of programming in violation of Section 76.1002(b) of the Commission's rules.[10] Wizard named TCI as a co-defendant based on TCI's alleged indirect ownership interest in SNG and claimed that TCI has unduly and improperly influenced the acts of SNG in violation of Section 76.1002(a) of the Commission's rules. The Bureau dismissed the claim with prejudice, finding that Wizard did not show that it had standing to bring a program access complaint.

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[8] *Corporate Media Partners d/b/a/ Americast and Ameritech New Media, Inc. v. Rainbow Property Holdings, Inc.*, Order, DA 97-2040 (rel. Sept. 23, 1997).

[9] *Wizard Programming, Inc. v. Superstar/Netlink Group, L.L.C. and Tele-Communications, Inc.*, Order, DA 97-2693 (rel. Dec. 24, 1997).

[10] 47 C.F.R. § 76.1002(b); *see* Communications Act § 628(c)(2)(B), 47 U.S.C. § 548(c)(2)(B).

SEPARATE STATEMENT OF CHAIRMAN WILLIAM E. KENNARD

In the Matter of Annual Assessment of the Status of

Competition in Markets for the Delivery of Video Programming

When Congress passed the Telecommunications Act of 1996, it mandated the sunset of cable rate regulation on March 31, 1999 for all but the basic service tier.[1] Congress predicted that in another three years, cable rate regulation would be a relic of a bygone era. Seemingly major legal barriers to competition were removed. An alphabet soup of new entrants -- RBOCs, DBS, MMDS, SMATV -- seemed poised to compete aggressively in the multichannel marketplace. Policymakers heralded the dawn of significant new competition to cable television, and the American people were promised lower prices and more competitive alternatives.

But less than 15 months away from the sunset of most cable rate regulation, it is clear that broad-based, widespread competition to the cable industry has not developed and is not imminent. Eighty-seven percent of those who subscribe to multichannel video programming receive service from their local cable operator. While this is certainly an improvement from the Commission's first report in 1994, it is largely attributable to the growth of direct broadcast satellite services (DBS). DBS, however, remains primarily a high-end product or a way to receive multichannel video service in areas cable does not reach. And while at least one local exchange carrier is beginning to provide cable service, telephone companies have not, on the whole, entered video markets on a widespread basis.

Rates for regulated cable programming and equipment rose 8.5% in the 12-month period ending July, 1997. Although increased prices have been accompanied by additional programming, consumers have no real opportunity to choose a range of programming at varying prices. Our Report

[1] 1996 Act, § 301(b)(2), codified at 47 U.S.C. § 543(d).

indicates that the presence of true, head-to-head competition to cable has a substantial downward effect on cable rates. Prices, not surprisingly, appear lower where there is competition than where there is none. But the much anticipated competition has yet to arrive.

The loser is the American public. They must pay the higher cable prices yet they have few competitive choices. Policymakers should no longer have high hopes that a vigorous and widespread competitive environment will magically emerge in the next several months to reverse the troubling increase in cable rates. I fear it will not.

Although the Communications Act mandates that we substantially loosen rate controls next year, there are actions we have taken, and some we can take in the interim, that can foster more competition. We recently proposed ways to improve the effectiveness of our program access rules. New entrants seeking to compete against incumbents must have a fair opportunity to obtain and market programming, and the Commission's program access rules must be enforced swiftly and effectively. Today's Report notes our preemption of undue limitations on a viewer's ability to install dishes and antennas on property they own and control. It describes our new rules giving certainty to alternative video distributors with respect to their right to use wiring installed by the incumbent cable operator in apartment buildings and other multiunit dwellings, and our provision for the rollout of digital television. These are valuable contributions toward competition.

Still, when confronted with allegations of price gouging, cable operators reflexively point to additional programming costs. The Commission's own rules and policies may be a source of this problem. We need to examine whether there are targeted adjustments that should be made to our rate rules. For example, our rules allow programming cost increases to be passed on to subscribers. But is this right? Should the consumer shoulder all the increased costs of programming, instead of sharing these costs among other revenue sources, such as advertising, commissions, and in some circumstances, payments from programmers themselves, especially where these other revenue streams may have grown since the benchmark rates were set?

Moreover, there are affiliations between cable operators and those who create and sell programming that add complexity to analyzing rates. I am therefore directing the Cable Services Bureau to commence a focused inquiry into programming costs to determine the sources of these increases, the variance in costs among various distributors, whether existing relationships impact the prices charged, and if programmers restrict consumer choice. This inquiry will require the cooperation and forthrightness of the industry.

We will also pursue the cable industry's own suggestion,[2] that we explore ways that the cable industry can provide consumers a wider range of choice in programming and prices, such that a consumer need not purchase programming that he or she does not want to watch. I look forward to the industry's recommendations in this regard. I am interested in examining the extent to which programmers restrict the cable operator's ability to market their programming, such as by requiring that programming be placed on a particular tier with other programming. Further, are most cable systems technically equipped to offer more customized programming packages, or would customization require settop boxes and other equipment, the cost of which would nullify the gains?

I am also instructing the Bureau to renew its enforcement efforts, giving particular emphasis and scrutiny not only to operators that do not commit an entire rate increase to the consumer's benefit, but also to examining closely all revenue received by the cable operator and the impact on the rate charged.

I also intend to ensure that the Commission concludes its rulemaking with respect to the state of horizontal concentration in the cable industry and its effects on competition. We must finish

[2] See remarks of Decker Anstrom, President and Chief Executive Officer, National Cable Television Association, at en banc presentation on the Status of Competition in the Multichannel Video Industry, Federal Communications Commission, December 18, 1997.

carrying out the law's requirement that we analyze the industry in this regard and put in place rules to restrain any anticompetitive effects of excessive concentration.

There are areas where enhanced competitive opportunities depend more upon changes in the law than on additional regulatory action. Direct broadcast satellite providers are largely prohibited from carrying local broadcast signals. Moreover, in obtaining the rights to network broadcast programming, DBS operators must pay more in copyright fees than cable pays for the same programming. With respect to program access, there is significant debate regarding our statutory authority, even where programming is unfairly or anticompetitively withheld from distribution in a way that frustrates the growth of competition. Further, competition in apartment buildings is limited because our statutory authority to allow use of the transmission wires by competitors extends only to circumstances where the incumbent has lost its right to remain in a building. Tenants would see more choice and better prices if an incumbent faced a competitive environment sooner. Similarly, dependent upon the outcome of a pending proceeding, the right of access by apartment dwellers and others to competitive video providers should be examined.

I would like to work with the Congress to evaluate these and other statutory proposals to eliminate barriers to competition. Congress is the final judge of the wisdom of proposals such as these. But I hope that the Commission will be called upon to assist Congress in assessing these legislative proposals.

Maintaining regulation as a surrogate for competition, and only until such time as competition arrives, is consistent with the historical underpinnings of federal regulation of cable television[3] and reaffirmed by the Telecommunications Act of 1996.[4] Yet I do not believe that, come March 1999, the consumer will be able to rely on a competitive market to ensure reasonable prices and choice.

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[3] 47 U.S.C. § 521(6), 47 U.S.C. § 543(a)(2).

[4] Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1996).

Therefore, I look forward to pursuing the initiatives I have described above to give the American public as much choice and value as can be achieved in the market that today's Report describes.

Statement
of
Commissioner Susan Ness

Re: Video Competition Report

The Fourth Report to Congress provides both good news and bad news for advocates of robust multichannel video competition. It concludes that competition is developing but is not as vibrant as we had hoped it would be by now. Direct Broadcast Service (DBS) and other competitors have made solid gains in subscribership, but their presence has not been felt broadly enough to hold the line on cable television rates.

Where telephone companies have overbuilt cable systems, prices generally have been driven down. The emergence of wire-based competitors is important since DBS is not a perfect substitute to cable service, limited by its present inability to deliver local signals, significant fees for service to additional TV sets, and upfront equipment costs.

Consumers continue to be pinched by double digit rate increases in many -- but not all -- systems. Some cable rate hikes may legitimately be attributed to added channels that viewers want, infrastructure upgrades, and improvements in customer service. But cable companies imposing major rate increases need to be sensitive to the value customers place on additional channels or upgrades, weighed against the additional cost of service.

The skyrocketing cost of programming -- especially sports programming -- poses a new set of issues.

First, I am increasingly concerned about the lack of program packaging choices available to subscribers. Today, all subscribers who want more than a basic package are forced to share the high cost of sports programming whether they watch it or not. It is time to weigh the pros and cons of cable tiering, with a view towards increasing the options without diminishing the ability of new networks to gain critical exposure. Second, since networks have the dual revenue stream of advertising support and distribution fees, are advertisers bearing at least the same proportion of increased programming costs as are captive subscribers? Third, the substantial interlocking collaborations among a handful of giant media companies, characterized so vividly as "American Keiretsu" by Ken Auletta,[1] warrant attention to ensure that market power does not result in abuse.

The marketplace of ideas should function just as other competitive product markets do. Market failure may occur when consumers do not have an effective alternative to their cable provider, or it may occur when a bottleneck develops in the programming distribution chain so that viewers are denied access to independent voices that would be heard in a competitive market. Cable television and other multichannel video systems provide enormous service to the American public. We must be vigilant, however, to ensure that market power does not impair consumer access to these valued services.

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[1] Auletta, *The Next Corporate Order: American Keiretsu*, The New Yorker, October 20 and 27, 1997, at 225.

SEPARATE STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH

In re: Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming

I am pleased to join in today's action, the issuance of the Commission's Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming.

I believe that the report does a fine job of detailing for Congress the current state of competitive affairs in the video delivery industries, as required by section 628(g) of the Communications Act. I wish to make clear that while I therefore support the report generally, I do not endorse the specific legislative proposals, save those based on section 713(f) of the Act, that it contains.

SEPARATE STATEMENT OF COMMISSIONER GLORIA TRISTANI

In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming

Much in this year's *Report* on the status of multichannel video competition has a familiar ring: there are pockets of head-to-head competition to cable, and some additional gains by DBS, but overall the cable industry retains its overwhelming dominance. Cable still controls 87% of multichannel video programming subscribers nationwide. All of cable's competitors -- e.g., DBS, MMDS, SMATV, HSD -- account for only 13% combined. Perhaps the most troubling aspect of these figures is that they do not reflect any quickening in the pace of competition. This year's modest 2% drop in the percentage of multichannel video subscribers controlled by cable was similar to the reductions tracked in the Commission's reports for 1994, 1995 and 1996.

This is not the dramatic change in the competitive landscape that was hoped for and expected with the passage of the Telecommunications Act of 1996. In particular, the 1996 Act freed telephone companies to compete head-to-head with cable operators in their telephone service areas. It was expected that telephone companies would seize the opportunity to enter the video market and provide consumers with a real alternative to the incumbent cable operator. But, with a few exceptions, this type of broad-based entry has yet to occur and there is little evidence that such competition is in the offing. To the contrary, some telephone companies seem to be actively withdrawing from previous efforts to explore full-scale entry into the video marketplace.

I am not convinced that DBS can fill that competitive vacuum. First, of course, DBS services do not carry local broadcast stations. Second, the current "up front" costs associated with DBS are substantial and place it out of reach for many Americans. As the *Report* indicates, the up front costs for DBS equipment and installation can amount to several hundred dollars. Moreover, in order to receive service on more than one television set -- not an unreasonable assumption in most homes -- a consumer must incur an additional substantial equipment charge and a monthly charge for each additional set. Because it fails to adequately reflect these costs, I expressly do not join in the comparison of cable and DBS prices in paragraphs 39-42 of the *Report*. While the comparisons do include a DBS equipment cost of $200, the *Report* spreads that cost over a five-year period without any adjustment for the fact that these costs must be paid in advance. And while the *Report* does note that installation costs and the costs of providing service to additional sets should be considered, I believe that omitting any numerical analysis renders the comparisons virtually meaningless. Consumers cannot assume away up front costs, or spread out such costs over five years interest-free. Consumers do not want to know whether it is possible to construct cable and DBS packages with similar per channel costs. They want to know how much each service is going to cost them and when. The comparison of cable and DBS prices would have been far more helpful had it attempted to answer that question.

My concerns about concentration in the video programming distribution marketplace also apply to concentration within the cable industry itself. Since 1990, the top MSO's percentage of cable subscribers has risen from 24% to 29.3%; during that period, the percentage claimed by the top four MSOs combined has risen from 45.6% to 62.3%. Even these figures may not reflect the entire story.

As detailed in the *Report*, some of the largest MSOs are entering into joint ventures and other business arrangements with each other on an unprecedented scale. None of these transactions are at issue here and I express no opinion on their respective merits. I do believe, however, that the Commission owes it to the parties and to the public to remove the current confusion surrounding our horizontal ownership rules as soon as possible. As the *Report* notes, those rules were voluntarily stayed in October 1993 in light of the D.C. district court's decision that the 1992 Cable Act's horizontal ownership provisions were unconstitutional. In August 1996, the D.C. Circuit held in abeyance any further review of the horizontal ownership provisions, and the Commission's rules promulgated thereunder, until the Commission completed its reconsideration of its rules. Thus, in effect, the Commission was waiting for the D.C. Circuit to rule, and now the D.C. Circuit is waiting for the Commission. This situation has now become particularly untenable, since depending how the recent transactions among large MSOs are treated, it appears that the horizontal limits originally issued by the Commission may be breached. I hope that the Commission will act to clarify this situation as quickly as possible.

My concern about concentration issues is heightened by rising cable rates. As the *Report* indicates, cable bills rose by an average of 8.5% last year, several times the rate of inflation. The cable industry has argued that much of these rate increases are due to increases in programming costs. I express no opinion on the existence of these additional costs, but I would make a few observations. First, it is difficult to make rational judgments about the effect of rising programming costs without accurate information. To that end, I believe that the Commission should consider some type of survey or reporting requirement so that actual programming costs can be reported, without revealing any confidential information, in next year's *Report*. Second, cable operators have two choices for recovering programming cost increases -- they can increase subscriber rates or they can increase advertising rates. Our current rules provide the cable industry little incentive to charge these costs to advertisers (not a captive audience), since we permit all of the costs to be passed on directly to consumers. Third, the *Report* describes several situations in which cable operators face actual head-to-head competition. Generally, the operators' responses were to offer customers new and improved services at similar or reduced prices. I am aware of no evidence that these operators are in financial difficulty or are unable to offer an attractive programming package to their customers.

Part of the answer to the dilemma of rising cable rates may not involve rates at all, but simply expanding consumer choice. One of the general underpinnings of our rate rules is that consumers should pay about what they would pay in a competitive video programming marketplace. I am coming to the conclusion, however, that consumers are being forced to pay for *packages* of programming that they would not buy in a competitive market, even at a reasonable price. In other words, even if our per channel prices were consistent with the per channel prices that would be charged in a competitive market, consumers may still be paying too much because they are being forced to purchase additional channels that they did not ask for and do not want. This may not have been a significant problem in a 30 or 40 channel universe, but in a 70, 80 or 100 channel universe, these unwanted channels can have a dramatic effect. As loudly as consumers complain about rates, they complain just as loudly about having to pay for additional programming services that they do not want and did not ask for.

This does not necessarily mean that all cable programming should be offered a la carte. It simply means that the cable industry can and should afford consumers more choice. In a competitive market, consumers would be able to choose from a range of video products because consumers have different needs and different resources. Some would choose the basic "Chevy" service; others would choose the fully-loaded "Cadillac"; others would choose a model in between. The cable industry's current position seems to be that all Chevy owners must upgrade to a Cadillac or do without a car. That is not the way a competitive market would act. This is not an argument about price -- the Cadillac may be worth every penny the cable operator is charging -- but about consumer choice.

While we all hope that one day competitive factors will hold cable rates in check, wishful thinking will not fulfill our statutory mandate to keep rates reasonable. I do not believe it is enough to simply tell consumers that competition is "just around the corner." Consumers need protection now. I challenge the cable industry to provide consumers with the additional choice that they want and deserve. And I urge my colleagues to take our statutory mandate to protect consumers seriously by continuing to take a hard look at this issue.